does not bind itself, under either the lease or the union contract (which covers the owner-operators as well as the full-time salaried drivers), to provide the owner-operators with freight; in fact, the services of the owner-operators and the use of their trucks are not required every day (R. 69).

By separate contract (R. 128–143), Oklahoma retains the owners as drivers. It is the usual practice and policy that they operate their own vehicles, but in occasional emergency situations others drive their vehicles and they drive the vehicles of others (R. 76, 81–82). If their services as drivers are not used, they receive no pay (R. 78). This contrasts with Oklahoma's treatment of its full-time drivers who operate the company-owned trucks. The latter receive a flat rate of $50 per week, regardless of the amount of driving, plus mileage (R. 77). The owner-operators and their vehicles are normally used only on long cross-country trips, while the salaried drivers and the company-owned vehicles are used for travel near the plant and normally are not on the road overnight (R. 79).

The lease provides that Oklahoma agrees to keep the leased vehicles in repair (R. 110). However, under the separate provision of the union contract governing the owner-operators, the responsibility for repair is passed back to them (R. 143) so that in fact, as the court below recognized (R. 16), they are responsible for both the cost of labor and parts used in repairs (R. 67). Oklahoma inspects the vehicles for compliance with I.C.C. safety regulations, but when defects are found the owner-operators have the

responsibility to make or arrange for the necessary repairs (R. 67–68, 51–52).

Ordinary running expenses, including the cost of gasoline, antifreeze, oil, grease and parts, as well as living expenses on the road, are paid for by the owner-operators (R. 110). The lease provides that the company shall retain five percent of all rental compensation due the lessees until $1,000 has been accumulated; the retained compensation is to be refunded at the expiration of the lease, after deduction of any expense which the company is forced to pay for the account of the owner-operator, or any other sums due the company under the contract (R. 111).

Oklahoma decides where and when trucks are to go (R. 111), loads them for outbound trips, and unloads the inbound shipments of raw materials. The lease agreement gives Oklahoma the right to specify the route to be followed (R. 111) and, when sending trucks out, Oklahoma loads the furniture in a way which controls the order in which stops must be made. The compensation, as already indicated, is based on the shortest possible route between stops. The company pays the social security taxes upon, and withholds income taxes from, the sums due the owner-operators as drivers (R. 42). Two weekly checks are issued, one covering the use of the tractor and the other the driving services rendered (R. 64). The company carries public liability and property damage insurance on the leased trucks and insures its own cargoes (R. 112). It does not carry collision, fire or theft insurance; the owner-operators procure

such insurance and bear the cost if they choose to place it on their vehicles (*ibid.*).

2. In proceedings before the Interstate Commerce Commission initiated under § 204(c) of the Interstate Commerce Act (49 U.S.C. 304(c)), the Commission determined (R. 161–162) that the owner-operators, when driving their own vehicles for Oklahoma pursuant to the lease arrangement, were engaged in transportation in interstate commerce for compensation. An order was entered (R. 166) directing them to cease and desist from engaging in such transportation without obtaining contract carrier permits from the Commission, as required by § 209(a)(1) of the Act (p. 4, *supra*).[8] Rejecting appellees' claim that the transportation was exempt private carriage performed by Oklahoma itself, with the owner-operators acting solely as employees, the Commission held that Oklahoma did not have the exclusive right to control the transportation operation in question (R. 153–155) and that, in any event, the services performed by the owner-operators were essentially equivalent in character to those performed by contract carriers (R. 160–161). On this latter point the Commission observed (R.156–157), *inter alia*, that the owner-operator:

[8] "* * * [T]he circumstances here," said the Commission (R. 161), "are such that the described operations would not constitute a bar to our finding the owner-operators fit to conduct comparable operations under appropriate permits should they apply to us and prove that their operations are consistent with the public interest and the national transportation policy."

> * * * assigns his motor vehicle for a continuing period of time to the exclusive use of the Company, furnishing a service designed to meet the distinct need of the Company. He provides a service in which the equipment is furnished, maintained, and driven by the owners thereof to transport property in interstate commerce. He guarantees a fixed and definite cost for the transportation, bears the risk of profit or loss from such transportation hazards as delays in transit, breakdowns of equipment, and highway detours, and meets all of the cost of operation including appropriate licenses and trip expenses.[6]

Upon review, the three-judge district court set aside the Commission's order (R. 13–25). It held that the Commission's findings as to Oklahoma's control over the operations were not supported by substantial evidence (R. 22–24). It concluded that

[6] The Commission found that "the only points of *possible* difference between the service here provided and conventional contract carrier services" were (1) the separate treatment Oklahoma gave to the owner-operators as lessors and employees respectively, (2) Oklahoma's assumption of liability insurance upon the leased equipment, and (3) upon the cargo and (4) its control over the owner-operators as "employees" (R. 157). The control was found to be one of the "concomitants of any contract-carrier operation devoted exclusively to the needs of a particular shipper" (*ibid.*). Cargo insurance by a shipper was deemed irrelevant in view of the lack of any obligation by contract carriers to insure their shipments, and the shippers assumption of liability insurance "little more nor less than a rate adjustment" (*ibid.*). Finally, the Commission concluded that giving effect to the formal separation between the functions of the owner-operator as lessor of the equipment and as its driver would merely result in opening the door to unfair and destructive competitive practices in contravention of the dictates of the National Transportation Policy. (R. 159).

Oklahoma "had the right to, and actually did control, direct and dominate the transportation of its products and the equipment and personnel concerned therewith" and that, therefore, "[t]he owner-operators were not in substance engaged in the business of transportation for-hire, but were merely employees of the Company * * *" (R. 22).

SUMMARY OF ARGUMENT

This case involves the drawing of the line between contract carriage, which requires a grant of authority from the Commission, and private carriage, which is exempt from economic regulation under Part II of the Interstate Commerce Act. The problem of delineating the areas of regulated and exempt transportation takes many forms; it is also a constantly recurring matter and one of grave concern to the Commission because of the substantial economic threat which unauthorized operations pose for members of the regulated industry who have assumed the burdens and responsibilities of public carriers. In its present context, the problem turns on the effect of a lease arrangement between the owner-operators of motor vehicles and a shipper-lessee.

The Act defines private carriers in terms of persons not falling within the definitions of contract and common carriers. In this case, therefore, it was necessary for the Commission to decide whether the owner-operators (the lessors) were engaged in transportation for hire (the hallmark of both contract and common carriage) or were merely leasing their equipment and hiring out their services as drivers. This determina-

tion, of course, was primarily one for the Commission, and the function of the courts is confined to the question whether the agency's conclusions have support in the record.

In making its determination in cases of this type, the Commission has invoked two tests, both of which must be satisfied if the transportation is to be regarded as exempt private carriage. The first is whether the shipper has "control." If he does not, plainly there is no basis whatever for concluding that he has taken over the transportation function. In this case, the district court has concluded that there is no substantial evidence to support the conclusion that the shipper does not exercise full control of the details of the shipping operation. We do not seek review of this evidentiary determination or of the question whether the district court viewed the control test too narrowly.

The fact, however, that the shipper so controls the operation (which we shall assume) does not, in and of itself, establish that he is acting as a private carrier. Indeed, it is commonplace for authorized contract carriers, performing as such, to subject their activities to the detailed control of one or more shippers to whom they have dedicated their specialized services. A second and no less critical factor in determining whether the shipper is to be deemed a carrier is whether he has assumed, in addition to control, the entrepreneurial risks and burdens of the transportation business. The undisputed facts of this case, we submit, fully warranted the Commission's conclusion that this shipper did not.

Under the leasing arrangement involved here, the owner-operators receive payment both for the lease of their vehicles and for their services as drivers at a fixed rate computed on the basis of miles of transportation actually performed. Compensation is unrelated to hours of service. Moreover, the owner-operators make the initial capital investment, assume all costs of operation and repair, take the risk of breakdown and road delay and, since the shipper does not guarantee any minimum amount of freight, bear the entire burden of overhead costs, including particularly those arising from non-utilization of time, labor and equipment. The net result is that the shipper purchases transportation (of which he controls the use) at a fixed cost per mile without patronising a regulated carrier and without bearing any of the essential financial risks of engaging in transportation.

In light of this factual situation, discussed more fully *infra*, the Commission's conclusion was, at the least, a permissible one, especially when it is considered that exceptions from the regulatory scheme of the Motor Carrier Act are to be closely confined. *McDonald* v. *Thompson*, 305 U.S. 263, 266. We point out additionally that the result is supported by decisions in comparable cases involving the question of carrier status under the Act and by various decisions involving the status of owner-operators under other statutes. We attach particular significance to this Court's decision in *Harrison* v. *Greyvan Lines, Inc.*, 331 U.S. 704, a case which involved the question whether owner-operators who were party to a lease arrangement of a similar type were "employees" un-

der the Social Security Act of 1935. This Court held that they were not, observing (p. 719) that "where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors." We do not, of course, suggest that status for purposes of one statute is necessarily the same as for another. But the analogy is all the stronger since the underlying policy of the Social Security Act favors "employee" status and that of the Motor Carrier Act calls for strict construction of the exemption provisions.

ARGUMENT

THE COMMISSION PROPERLY HELD THAT THE OWNER-OPERATORS BEAR THE ESSENTIAL RISKS OF MOTOR TRANSPORTATION AND ARE THEREFORE SUBJECT TO THE REGULATORY PROVISIONS OF THE INTERSTATE COMMERCE ACT

The statutory scheme for motor carrier regulation set out in Part II of the Interstate Commerce Act provides for detailed licensing and regulation of both "common carriers" (49 U.S.C. 303(a)(14)) and "contract carriers" (49 U.S.C. 303(a)(15). With certain exceptions, § 203(c) (49 U.S.C. 303(c)) precludes any person from engaging in for-hire motor transportation without a certificate or permit issued by the Commission. Private carriers of property by motor vehicle are not subject to the requirement of certification or to economic regulation, although the Commission is authorized to impose reasonable safety requirements upon their operation.[1]

[1] Section 204(a)(3), 49 U.S.C. 304(a)(3).

Section 203(a)(17) of the Act (49 U.S.C. 303(a)(17)) defines private carriers as persons not falling within the definition of either common carriers or contract carriers who utilize motor transport in interstate or foreign commerce to transport their property in furtherance of their business. In practice, the question usually presented to the Commission in the marginal case is whether the particular form of transportation should properly be classified as contract carriage for compensation or as private carriage. Since the latter category is defined in terms of the former, the Commission, in resolving the question whether a particular type of operation is subject to its licensing authority, must determine the extent to which the operation is characterized by the normal indicia of contract carriage. In other words, the private-carrier definition "applies only to the extent to which § 203(a)(15) [the contract carrier definition] does not." *Schenley Corporation* v. *United States*, 326 U.S. 432, 436.

Over the years, the question whether certain types of leasing arrangements result in contract carriage has become a matter of increasing concern to the Commission. Private carriers, of course, need not own their vehicles outright; they may lease them from their owners. Moreover, they may employ the owners to drive such leased vehicles without necessarily converting the operation into a contract-carriage operation. But it is also clear that owners of motor vehicles should not be permitted to avoid regulatory requirements merely through the device of formally

leasing their trucks and hiring themselves out as drivers if the substance of the arrangement is that they are providing a transportation service for hire. Accordingly, it has become necessary for the Commission to work out principles for determining in individual cases whether contract or private carriage is involved.

One factor which the Commission has invariably considered is whether the shipper has control and domination of the details of the transportation. Obviously, if the shipper does not exercise complete control over the transportation of its goods, it cannot even purport to be a private carrier.* But while the absence of such control negates any claim of private carriage, the converse is not true. Since a contract carrier's activities may be under the detailed control of a shipper to whom he has dedicated his operations without affecting his status as a contract carrier, the Commission, in situations where such control exists, must go further in order to ascertain whether the service, viewed in its totality, constitutes transportation for hire by the owner-operator or private carriage operated by the shipper in its own behalf. The determination of that matter is primarily for the Commission, for "where the question is one of specific application of a broad statutory term in a proceeding

* In this appeal, we do not challenge the district court's conclusion that the evidence did not warrant a finding that Oklahoma lacked full control of the details of the operation. Nor do we argue as to whether the court below gave too narrow a meaning to the Commission's control test. We assume, for present purposes, that the court below correctly applied that test as relating only to the operational aspects of the transportation.

in which the agency administering the statute must determine it initially, the reviewing court's function is limited" to the issue of whether the agency's "ultimate conclusions * * * have support in the record." *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 130–131.

As the district court stated in its opinion below (R. 20–21):

> In reaching its decision on the primary issue herein involved, the Commission utilized two tests: (1) Did anyone other than the Company have any right to control, direct and dominate the transportation involved, and (2) Were the owner-operators in substance engaged in the business of interstate or foreign transportation of property on the public highways for hire. Both tests have been approved by the courts [citations omitted].

The remainder of the opinion, however, is concerned only with the extent of Oklahoma's control and dominance over the details of the transportation operations carried out by the owner-operators. The court ultimately rested its decision solely on its conclusion that "[t]he Company dominates and controls the transportation in question just as it did prior to the inauguration of the leasing arrangements. * * * The same degree of control is exercised by the Company over the operations of the owner-operators as is exercised over those of drivers of company-owned vehicles" (R. 23). Thus, the court has held in substance that owner-operators of motor vehicles are not engaged in transportation of property by motor vehicle for hire whenever they have subjected the details of their operations to the dominance and control of a particular

shipper. It is that aspect of the holding which we dispute.

As we shall urge below, the court's view of the distinction between private and contract carriage is inadequate. Whether a party falls within the category of "contract carrier" created by statute does not depend alone upon criteria of "control" or "domination." Rather, the determination must be made in the light of the ends to be fostered by economic regulation. In our view, the status of motor carriers depends critically upon the allocation of the financial burdens and risks involved in performing the service. We submit that the party who seeks to profit from transportation, *qua* transportation, and who bears the essential risks of engaging in it, should be treated as the person performing the carriage for purposes of determining whether the scheme of economic regulation applies. Otherwise, the potentialities for greatly expanding the area of private carriage might seriously impair the health of the nation's motor transportation system.

A. Bona fide private carriage is specifically exempted from the certification requirements of the Interstate Commerce Act in recognition of the various advantages which may be incident to true private carriage. There is no doubt that many firms prefer to provide their own transportation facilities in order to meet customer demands more readily and to serve customers at points not adequately served by regulated carriers.

There are, however, numerous inherent disadvantages in a shipper's undertaking private carriage—

disadvantages which provide a natural limitation on the extent of diversion of traffic from the regulated carriers. Investment in equipment is required, either by purchase or by leasing arrangement, and employment of drivers means increased payroll obligations. Doubtless, one of the greatest economic hazards of private carriage is "dead-heading"—the necessity of returning trucks empty to the point-of-origin when backhauls of raw materials are unavailable or unneeded.[9] Efficient utilization of both equipment and men requires close supervision and experienced management.[10] For a company without the necessary experience in the transportation business the risks of loss are substantial, particularly if, as is often the case, the volume of shipment is small or subject to significant fluctuation. Thus, so long as shippers can undertake private carriage only by assuming these risks and burdens, natural economic forces provide a limit upon the diversion of traffic from regulated carriers.

The statutory test was conceived in light of this natural limitation on bona fide private carriage. The original Motor Carrier Act of 1935 defined a private carrier (Section 203(a)(17), 49 U.S.C. 303(a)(17))

[9] Many "private" carriers originally sought to overcome this hazard by buying goods not used in the course of their primary business at the point of destination and reselling them at the point-of-origin. These so-called "buy and sell" practices were specifically condemned in the 1958 amendment to Section 203(c) of the Act. See p. 21, *infra*.

[10] It was, for example, because of Oklahoma's inability to prevent credit card abuses by its drivers and its fears that they would not properly maintain company-owned trucks, that it abandoned the use of its own trucks on long hauls and resorted to the leasing arrangements here involved.

as a person who was not a common or contract carrier—*i.e.*, not engaged in "transportation by motor vehicle * * * of * * * property * * * for compensation" (see 49 U.S.C. 303(a)(14) (common carrier); 49 U.S.C. 303(a)(15) (contract carrier)). In 1957, Congress added Section 203(c) (49 U.S.C. 303(c)) which expressly prohibits unlicensed operations by motor vehicles "for-hire." The further amendment of the new provision, in 1958, made it clear that private carriage was limited to transportation of goods in furtherance of the shipper's primary business enterprise and that private carriers could not make additional uses (see note 9, *supra*) of their equipment.[11] The question whether an operation is contract carriage (requiring a license) or private carriage (which does not) thus turns on whether a shipper is purchasing transportation for hire, or, instead, is separately acquiring the factors of which transportation is comprised (labor, equipment, fuel, etc.) and combining them into a functioning transportation facility which he operates in furtherance of his own, non-transportation interests.

[11] The 1957 and 1958 amendments were the direct outgrowth of congressional recognition of the general problems created by the steady increase in non-regulated private and exempt motor transportation, including much "motor carriage which although performed under the guise of private transportation is actually public transportation." (S. Rep. 1647 on Transportation Act of 1958, 85th Cong. 2d Sess., pp. 23–24). See also S. Rep. 1039 on Domestic Land and Water Transportation, 82d Cong. 1st Sess., pp. 20–21; H. Rep. 1922 on Transportation Act of 1958, 85th Cong. 2d Sess., p. 19; 69th annual Report, I.C.C., p. 99 (1955); 70th Annual Report, I.C.C., pp. 161–162 (1956); cf., *Gray Area of Transportation Operations*, I.C.C. Bureau of Transport Economics and Statistics (1960), pp. 108–109.

Under the leasing arrangements between Oklahoma and the owner-operators, the owner-operators provide the vehicles, drive them themselves (save in exceptional circumstances) and bear the entire risk of the investment of time and money. They are entitled to payment from Oklahoma only at a fixed cost per mile of transportation actually performed. The owner-operators thus bear the initial capital investment, all costs of operation and repair, the risk of breakdown and road delays and, perhaps most significant of all, the entire burden of non-utilization.[13] The only risk assumed by Oklahoma in the operation of the tractors [14] is that of liability to the public, which since it is passed on to insurers, ultimately amounts to no more than a rate adjustment between the company and the owner-operators (R. 157). The net result is that Oklahoma is buying transportation at a fixed cost per mile from the owner-operators and the latter bear the financial risk of engaging in transportation.

In form, of course, the owner-operators purport, by virtue of the separate leasing and collective bargaining agreements, to "sell" their labor and the use of their trucks. It is the economic reality behind the arrangements, however, not their form, which is

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[13] As already indicated (see Statement, *supra*, pp. 7–8), the services of the owner-operators and their trucks are not utilized every day by Oklahoma. The customary practice is for the owner-operator either to telephone the company or check the bulletin board to see if he is to ship out on a given day.

[14] Oklahoma does provide the trailers and bear the cost of cargo insurance, but that, of course, is typical of the contract carriage to which the Commission equated the operations here. See *Motor Haulage Co., Inc.* v. *United States*, 70 F. Supp. 17, affirmed, 331 U.S. 784.

crucial in determining the status of a carrier. The reality here is that the owner-operators assume all of the financial risks and bear all the variable costs, whereas Oklahoma is in the end required to pay only a predetermined fixed cost per mile for such transportation services as are *actually performed*. What Oklahoma pays for—and what the owner-operators provide—is a complete transportation service as such, not hours of labor or use of vehicles. The compensation of the owner-operator "employees", as contrasted with that of the regular Oklahoma drivers, is not related to hours of work. Moreover, there are none of the fixed charges characteristic of ordinary equipment leases, such as a daily "overhead" charge for the exclusive use of the vehicle during the term of the lease or a minimum mileage guarantee.[14]

The Commission, on the basis of these facts, held that, independently of any question of the extent of Oklahoma's control over the operating details of the transportation activities, the owner-operators were essentially engaged in contract carriage for Oklahoma. The decision below, by making the single element of operational control determinative, permits Oklahoma,

[14] In *Bridge Auto Renting Corporation* v. *Pedrick*, 174 F. 2d 733 (C.A. 2), certiorari denied, 338 U.S. 850, the issue was whether the lessor of trucks (the lessor selected the drivers but they were paid by the lessee who had "exclusive control and direction over" them, 174 F. 2d at 735) was "engaged in the business of transporting property for hire" within the meaning of the Internal Revenue Code. The fact that the rental was usually a fixed amount every week for a stated average minimum weekly mileage, plus a stated amount for each mile in excess of the minimum, did not preclude a determination that the lessor was subject to the tax.

by the expedient of contracting for "control" of the operations, to obtain, at a fixed cost per mile, transportation not subject to the Commission's regulations, while at the same time leaving to the owner-operators the entire risk of loss, both of time and of money, arising from the exigencies of the transportation business.

The court below did not elaborate upon its conclusion (R. 22) that the owner-operators' asserted lack of control over the transportation of Oklahoma's goods negates "any presumption or inference of transportation for-hire." As we have argued above, control, though a relevant factor, is not dispositive. Indeed, the definition of a contract carrier, set out in 49 U.S.C. 303(a)(15), makes clear that "assignment" by the carrier "of motor vehicles for a continuing period of time to the exclusive use of each person served" or furnishing "transportation services designed to meet the distinct need of each individual customer" is the very essence of contract carriage by motor vehicle. The elements of Oklahoma's control or direction over the transportation activities of the owner-operators which the district court treated as conclusive proof that the latter were not engaged in contract carriage were in fact no more than "any shipper would normally exercise with respect to carrier service rendered to it by a carrier by motor vehicle, and especially a contract carrier by motor vehicle" (*Interstate Commerce Commission* v. *Cheesebrough*, 77 F. Supp. 441, 443). See *R.N.G. Commercial Auto Renters, Inc., Contract Carriage Application*, 73 M.C.C. 665, 669 ("Here [shipper's] foreman assigns the drivers to the vehicles, supervises them as to their duties, instructs

them as to the delivery of the merchandise, and requires them to report their deliveries and to file delivery tickets or receipts. Such practices, however, are natural concomitants of any contract carrier operation devoted exclusively to the needs of a particular shipper * * *"); *Keystone Transportation Company, Contract Carrier Application,* 19 M.C.C. 475, 498 (concurring opinion of Commissioner Eastman).

It would hardly be seriously contended that a contract carrier, owning its vehicles and providing drivers, would lose its status because, in contracting to perform transportation services for a particular shipper, it agreed that the customer would assume direction of the shipping operation. The only facts which give color to Oklahoma's claim to be a private carrier are that, in addition to exercising control over the transportation operations, it has purported to lease the equipment and to employ the drivers. This combination might, in different circumstances, lead to a conclusion that Oklahoma was in fact engaged in private carriage. It does not do so here where the Commission has found, upon clearly substantial evidence, that the particular leasing and employment arrangements leave the owner-operators in essentially the same position they would have been had they directly contracted to provide transportation service to Oklahoma at a fixed rate per mile.

B. There is nothing novel in the Commission's going beyond the factor of control in order to determine the actual status of the parties under the Interstate Commerce Act. Innumerable cases in this and the

lower courts—involving either the specific question whether a person must secure a license from the Commission as a common or contract carrier or analogous questions as to whether owner-operators are employees or independent contractors under the Social Security laws or "engaged in the business of transporting property for hire" under Section 3475 of the Internal Revenue Code (26 U.S.C. (1952 ed.) 3475)—have stressed that "[i]t is the total situation, including the risk undertaken, the control exercised, [and] the opportunity for profit from sound management" which determines the status of owner-operators of motor vehicles (*United States* v. *Silk*, 331 U.S. 704, 719). See *Lamb* v. *Interstate Commerce Commission*, 259 F. 2d 358 (C.A. 10); *A. W. Stickle Co.* v. *Interstate Commerce Commission*, 128 F. 2d 155 (C.A. 10), certiorari denied, 317 U.S. 650; *Georgia Truck System* v. *Interstate Commerce Commission*, 123 F. 2d 210 (C.A. 5); *Bridge Auto Renting Corp.* v. *Pedrick*, 174 F. 2d 733 (C.A. 2), certiorari denied, 338 U.S. 850; *John J. Casale, Inc.* v. *United States*, 86 F. Supp. 167 (C. Cls.); *Interstate Commerce Commission* v. *Gannoe*, 100 F. Supp. 790 (W.D. Pa.). Compare *United States* v. *Rosenblum Truck Lines*, 315 U.S. 50; *Thomson* v. *United States*, 321 U.S. 19.

Even in those cases decided solely or primarily on the basis of control and domination, the courts have recognized that, in some instances, the Commission's inquiry might have to go further. Thus in *United States* v. *La Tuff Transfer Service*, 95 F. Supp. 375, 380-381 (D. Minn.), a case cited by the court below as one approving the control analysis (R. 21), the court stated:

> The decisive question to be determined is how much service, if any, in addition to the vehicle alone, may be rendered to the shipper-lessee by the owner-lessor before the borderline between renting and leasing a truck for private carriage is crossed and the broad and all-inclusive field of transportation occupied.
>
> * * * * * * * * * * * * Where one's object in the transportation of property on public highways is to earn compensation for the use of his equipment and his services, he cannot evade regulation by execution of leases or other agreements which purport to give the alleged lessee the status of a private carrier.

See, also, *Interstate Commerce Commission* v. *Isner*, 92 F. Supp. 582 (E.D. Mich.); *Interstate Commerce Commission* v. *F. & F. Truck Leasing Company*, 78 F. Supp. 13 (D. Minn.).

The view which we urge carries out the precept that remedial legislation is to be read "in the light of the mischief to be corrected and the end to be attained" *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251, 259. The motor carrier provisions of Part II of the Interstate Commerce Act are remedial with exceptions thereto "to extend only to carriers plainly within [their] terms," *McDonald* v. *Thompson*, 305 U.S. 263, 266. See *Schenley Corp.* v. *United States*, 326 U.S. 432; cf., *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, *Bartels* v. *Birmingham*, 332 U.S. 126, 130.

A close analogy to the present case is found in this Court's decision in *Harrison* v. *Greyvan Lines, Inc.*,

331 U.S. 704 (decided together with *United States* v. *Silk, supra*). There, the Court, concluding that certain truckmen were independent contractors, rather than "employees," within the meaning of the Social Security Act of 1935, expressly rejected any suggestion that "the so-called 'common-law control' test [illegible] conclusive" (331 U.S. at 720; dissenting opinion [16]). To be sure, the *Greyvan* case involved a different statute; and status, for purposes of different statutes, may not be the same. But it is significant, in making the comparison, that the broad policies underlying the Social Security Act were such as to favor strongly the conclusion, if warranted by the facts, that the truckers were "employees".

The leasing arrangements involved in the *Greyvan* case were strikingly similar to those here. The owner-operators were required to haul exclusively for the lessee, to pay all the ordinary expenses of the operation, to drive their trucks personally at all times or be present on the truck when a competent relief driver was driving, and to follow all rules, regulations and instructions of the company, including directions as to where and when to load freight. The company maintained a staff of dispatchers who issued orders for the owner-operators' movements, although not the routes to be followed. However, the lessors were paid on the basis of a percentage of the applicable tariff charged and, of course, the incentive was to take the shortest possible route. The drivers reported their positions to the company at regular in-

[16] On this point, the majority and the dissenting opinions were in full agreement.

tervals. Cargo insurance was paid by the company. All permits, certificates, and franchises necessary to the operation of the leased trucks were to be obtained at company expense. A contract between the lessee and a local of the Teamsters' Union was applicable to the owner-operators as well as to a staff of full-time salaried drivers who admittedly were employees. Operation of the leased vehicles and of those belonging to the company and driven by its own drivers was carried out in the same manner.

Looking to the "economic reality" of the situation (331 U.S. at 713), this Court stated (p. 716) "that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision." The Court noted that the owner-operators "hire their own assistants [if any], own their trucks, pay their own expenses, with minor exceptions, and depend on their own initiative, judgment and energy for a large part of their success (*ibid.*)."[16] And it concluded (p. 719): "[W]here the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. * * * It is the total situation, including the risk undertaken, the control exercised, the opportunity for

[16] With respect to workmen in the *Silk* case, who merely unloaded coal from trucks, the Court, in holding them employees, said (331 U.S. at 717–718): "They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools."

profit from sound management, that marks these driver-owners as independent contractors."

Appellees suggest, however (Drum Motion to Affirm, pp. 13–14), that this Court's recent decision in *Teamsters Union* v. *Oliver,* 358 U.S. 283, stands for the proposition that owner-operators, such as those involved here and in the *Greyvan* case, are "employees" of the lessee and hence, by necessary implication, not themselves contract carriers. In the *Teamsters* case, the courts of Ohio had held invalid, under the State's antitrust laws, a clause in a collective bargaining agreement between the Teamsters and a group of interstate motor carriers. This clause established minimum rate scales which a carrier would pay when a motor vehicle was leased to a carrier by an owner who was to drive his vehicle in the carrier's service. Holding that the arrangement directly related to a subject of mandatory collective bargaining covered by the National Labor Relations Act, this Court declared that the Ohio antitrust statute must give way. The decision holds at most, that where an owner of a motor vehicle leases it to a carrier which simultaneously enters into a union contract purporting to "employ" the lessor as the driver of his truck, both the owner-operator and the carrier are estopped from contending that the former is in fact an independent-contractor outside the coverage of the Labor Act. Nothing in the Court's opinion indicates, one way or the other, whether the owner-operators in that case were performing any carrier functions which might warrant regulation under the Interstate Commerce Act. In-

deed, the majority opinion in this Court does not in terms discuss the question whether the owner-operators were independent contractors or employees. In failing to do so, it may well have agreed with the opinion of the Ohio trial court which held (Record, No. 49, Oct. Term 1958, pp. 168, 246), that the status of the owner-operators was immaterial and that the real issue was whether the subject matter of the disputed provision of the collective bargaining agreement was, in the words of the Ohio court, a "remote and indirect approach to the subject of wages" or, as this Court subsequently determined, "a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract." See 358 U.S. at 294.

We emphasize, finally, that most members of the shipping public depend upon the regulated carriers for motor transportation and that the Commission is charged with the duty of protecting the economic stability of those who assume the burdens and responsibilities of public carriers. The Commission believes that if exemptions are not carefully confined to their proper scope, the flow of traffic away from regulated carriers will increase significantly and the economic problems of those carriers will be correspondingly aggravated. Shippers are, of course, free in all events to assume the financial and other risks involved in the transportation business and to become private carriers. But those risks, it is believed, tend to limit private carriage to the more or less exceptional case in which it offers important efficiencies of operation. The decision below permits the shipper to buy a transporta-

tion service virtually identical with that which regulated carriers characteristically provide without patronizing a member of the regulated industry and without assuming the financial risks of private carriage. There is an obvious incentive for others to follow this course since the unregulated competition which exists among owner-operators frequently enables the shipper to obtain from that source rates which are cut below those of regulated carriers. For these reasons, we believe that the type of enforcement which the Commission has attempted in this case bears an important relationship to the maintenance of a sound national transportation system.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed with directions to dismiss the complaint.

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